

STATE OF MICHIGAN
COURT OF APPEALS

RICHARD P. FERRIS,

Plaintiff-Appellant,

v

DETROIT STOKER COMPANY,

Defendant-Appellee.

UNPUBLISHED

April 9, 1999

No. 205743

WCAC

LC No. 95-000055

Before: Markman, P.J., and Jansen and J.B.Sullivan,* J.J.

PER CURIAM.

Plaintiff Richard Ferris appeals by leave granted a decision entered on July 29, 1997, by the Worker's Compensation Appellate Commission (WCAC) affirming in part and reversing in part the decision of the magistrate and denying him weekly wage loss benefits. We reverse the opinion of the WCAC, and reinstate the decision of the magistrate.

Plaintiff began working for defendant Detroit Stoker Company in 1974. He worked in the mechanical maintenance department. Plaintiff performed electrical work, plumbing repairs, and maintenance work on pumps. Plaintiff drove a front-end loader, ran lights and wires, and changed bulbs. His duties required bending, lifting up to 200 pounds, twisting, using hand and vibrating tools, climbing and much overhead work.

On March 3, 1986 plaintiff was working on top of a boiler 30 to 40 feet off the ground. He slipped and fell 15 to 20 feet. As he was falling, his right elbow became caught in a pipe. His whole body jerked as the fall stopped abruptly. His body went numb and he experienced dizziness. Plaintiff then fell to the ground, and was off work for one week. When he returned to work, he limited himself to bench work for a couple weeks because his ribs were sore and he had difficulty breathing. Shortly thereafter, he underwent by-pass surgery. He stated that prior to the surgery he experienced dizziness and numbness on his right side, had problems reaching overhead, tended to drop things and had difficulty breathing. However, prior to the fall, he had experienced none of those conditions. After recovering from the surgery, plaintiff returned to work. He was not able to do his regular work because

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

his shoulder and neck bothered him since the fall, and he did not feel better than he did before the surgery. Therefore, plaintiff again limited himself to bench work.

On August 24, 1987 plaintiff was using an electric drill to do overhead work when he experienced numbness in his right arm which caused him to drop the drill. Plaintiff was referred to Dr. Martinez who diagnosed thoracic outlet syndrome and performed two operations to remove ribs. Nevertheless, plaintiff continued to experience numbness in his arms and also experienced headaches and insomnia. In February, 1988, plaintiff returned to his regular job. The doctor did not want him to return until after carpal tunnel surgery had been done, but plaintiff promised to take it easy. He found that he could not tolerate climbing or the use of power tools, so he transferred to defendant's shipping department because he knew he would not have to use as many power tools there. In spite of exercise therapy before going to work, his right side would get numb during the day. On September 28, 1988, after dropping some castings (one of which landed on a coworker's foot), plaintiff left defendant's employ. Plaintiff had passed out, and attributed the incident to the continuing dizziness which started right after he fell, and also to the severe headaches.

Plaintiff's petition, filed on or about October 6, 1989, alleged disabling bilateral carpal tunnel syndrome and bilateral thoracic outlet syndrome. At trial in November of 1994, plaintiff stated that his condition had not changed since his last day of work. He stated that he could no longer engage in activities such as running a vacuum cleaner, fishing, or bowling. He stated that he continued to have numbness on his right side, and that he experienced periods of lightheadedness and dizziness. He sleeps in a Lazy-Boy chair, but his sleep is disturbed because after twenty minutes in one position extremities tingle, feeling like they have fallen asleep. Prior to the fall, he had not experienced numbness or dizziness. He has had helpful therapy at three hospitals for his symptoms, the worst of which are neck pain and dizziness, but those conditions and the numbness still exist. He cannot work an eight hour day because, after fifteen to twenty minutes work, he must stop, sit and then exercise for up to a half hour.

A private investigator testified that he had videotaped ninety-one hours of plaintiff in April and September of 1993 and in May of 1994. The investigator stated that on one occasion he observed plaintiff and two other men lift a portable engine hoist onto a truck. He estimated the weight of the hoist at 75 to 100 pounds.

Four physicians testified by way of deposition. Durgada Basazarej, M.D., board-certified neurologist, first saw plaintiff in May of 1987 for numbness in both hands and shoulder discomfort. An EMG was suggestive of mild, bilateral carpal tunnel syndrome, which Dr. Basazarej opined was work-related and disabling. In August of 1988, after plaintiff's surgeries for heart by-pass and thoracic outlet syndrome, Dr. Basazarej again saw plaintiff for neck pain and numbness in both hands. He recommended surgery for plaintiff's carpal tunnel syndrome.

Bernardo Martinez, M.D., board-certified general and vascular surgeon, saw plaintiff in June of 1987, and performed two rib removal surgeries on plaintiff in 1987 for what he diagnosed as occupational thoracic outlet syndrome. Plaintiff did not present a history of injury or trauma, and Dr. Martinez operated first on plaintiff's left side which had more severe symptoms. He opined that plaintiff's condition was work-related, that there was a strong possibility of carpal tunnel syndrome, and that plaintiff should not return to work. However, he released plaintiff to return to work in February of 1988 because plaintiff was very anxious to return and was sure he could do the job. Dr. Martinez opined that plaintiff's inability to handle that work and subsequent leaving could be due to scarring, a continuing weakening of the muscles or carpal tunnel syndrome, the latter in turn being part of "four

compression disease” which starts with cervical disk disease from above, thoracic outlet at the second level, ulnar nerve at the elbow and carpal tunnel at the wrist.

Dr. Martinez received a letter from Edmund Lawrence, M.D., a neurosurgeon who saw plaintiff in October of 1988 for neck pain, headache and worsening hand numbness. Plaintiff reported using heavy power tools and jack hammers at work, and Dr. Lawrence noted callouses on plaintiff’s hands. Plaintiff’s EMG/NCV suggested bilateral carpal tunnel syndrome. Dr. Lawrence’s findings included bilateral weakness in the hands and bilateral tardy ulnar palsy. He recommended surgery for carpal tunnel syndrome.

Zacharias Asuncion, M.D., board-certified thoracic and cardiac surgeon, treated plaintiff from February of 1989 until April of 1994. Plaintiff initially presented with neck pain, dizzy spells, numbness in the upper extremities, dropping things and passing out. Dr. Asuncion diagnosed a permanent residual thoracic outlet syndrome probably from scar formation, and referred plaintiff to physical therapy and consultations in neurology and orthopedics. He opined that plaintiff’s employment exacerbated his condition and that, while plaintiff should not return to his regular work, plaintiff could do some types of work below shoulder level. Plaintiff gave a history of two falls due to dizziness while going up stairs. Dr. Asuncion stated that they did not know the cause of the dizziness, but that he did not think it was related to thoracic outlet syndrome. Thoracic outlet syndrome can be caused by an extra rib, excessive muscular development such as by athletes or workers doing muscular jobs, scar formation, or injuries, and can be determined from a nerve conduction test. The test on plaintiff showed nerve entrapment at the wrist level, which was corroborated by plaintiff’s subjective complaints. Dr. Asuncion knew of plaintiff’s 1986 fall from the records, and opined that wrist numbness was consistent with plaintiff’s history and condition. In October of 1988, plaintiff’s EMG neither confirmed nor ruled out thoracic outlet syndrome.

At defendant’s request, Roland J. Brandt, D.O., board-certified orthopedic surgeon, saw plaintiff on two occasions, November of 1992, and August of 1994. He found no evidence of orthopedic disability. This conclusion was based on a history inconsistent with someone with a thoracic outlet problem and on a normal examination. He stated that plaintiff’s 1986 fall could have caused thoracic outlet syndrome, but that the rib surgery on plaintiff’s left side was not explained by the fall which affected the right side. Thoracic outlet syndrome can be caused by trauma but also can just appear. Its symptoms include numbness, tingling and loss of pulse. Angiograms and EMG tests can be useful in diagnosing thoracic outlet syndrome, and EMG testing is helpful in diagnosing carpal tunnel syndrome. In the course of the two examinations of plaintiff, Dr. Brandt took one x-ray of the neck but none of the shoulder, upper arm, upper rib cage, lower arm, wrist or hands, nor did he refer plaintiff out for EMG testing, an angiogram, or any other diagnostic test used to determine the presence of thoracic outlet syndrome or carpal tunnel syndrome. For his 1994 examination of plaintiff, Dr. Brandt knew that plaintiff had been seen by Drs. Miller, Asuncion and Bonseri, but did not request to review the records of those doctors. He was aware that two of plaintiff’s EMG’s indicated carpal tunnel syndrome, and agreed that heavy, strenuous, repetitive use of the hands and wrists such as plaintiff experienced in his work as a maintenance man for his employer can precipitate carpal tunnel syndrome. However, he opined that plaintiff did not suffer from that condition because there was no muscle atrophy, and his symptoms of numbness, tingling and weakness “did not follow a dermatomal pattern” that Dr. Brandt was able to discern. As to the latter, it is possible that the presence of both carpal tunnel syndrome and thoracic outlet syndrome could be the explanation. Dr. Brandt agreed that a fall such as plaintiff’s

would be a terrific trauma to the shoulder and upper rib cage. He was aware that Dr. Lawrence recommended surgery in 1988 for bilateral carpal tunnel syndrome based on the EMG testing at that time. However, Dr. Brandt did not order new EMG testing.

In a decision mailed on December 20, 1994, the magistrate found that plaintiff suffered a work-related injury on March 3, 1986, when he fell approximately 30 feet getting hung up by his right armpit. Plaintiff immediately complained of upper extremity numbness and tingling. Three weeks later, plaintiff underwent by-pass surgery, subsequently returning to work. On August 24, 1987, plaintiff experienced numbness and dropped an electrical drill. He was referred to Dr. Martinez who diagnosed occupationally related thoracic outlet syndrome and performed two surgeries on plaintiff for that condition. Dr. Brandt testified that thoracic outlet syndrome can be caused by one-time or repetitive trauma. Dr. Martinez believes that the work plaintiff performed after he again returned to work, including repetitive overhead work and the use of power tools, aggravated his thoracic outlet syndrome to the point of disability. Dr. Asuncion stated the condition was permanent.

The magistrate found a job injury date of March 3, 1986, resulting in traumatic injury to the right armpit. Based on the testimony of Dr. Martinez, the magistrate further found that, after surgery for occupationally related thoracic outlet syndrome, the job fall and/or plaintiff's subsequent work caused or aggravated plaintiff's condition resulting in disability, with the last day worked injury date of September 28, 1988. Based on the testimony of Dr. Basavaraj, the magistrate found that plaintiff suffered mild carpal tunnel syndrome. Dr. Martinez explained that limitations to one's upper extremities can be caused by four compression diseases, the latter being carpal tunnel syndrome. The magistrate found that Dr. Martinez's explanation established a nexus between thoracic outlet syndrome and bilateral carpal tunnel syndrome, and that plaintiff was disabled by virtue of both thoracic outlet syndrome and bilateral carpal tunnel syndrome. The magistrate found that plaintiff's dizziness and blackouts were not related to those conditions, but granted plaintiff an open award of weekly wage loss benefits and payment for reasonable medical treatment of his disabling conditions.

Defendant appealed, and in a decision entered on July 29, 1997 the WCAC found that the evidence did not support a conclusion that plaintiff left work due to work-related conditions, but rather that plaintiff left work due to dizziness and his fear that he would hurt someone. The WCAC noted that no medical testimony connected plaintiff's dizziness to his fall or the resultant thoracic outlet syndrome. The WCAC found that, in transferring to the shipping department, plaintiff was not performing favored work as of his last day of work but rather a regular job which plaintiff obtained through defendant's bidding process. The WCAC concluded that because plaintiff left his regular job for reasons unconnected to that work, he was not entitled to weekly wage loss benefits. The WCAC found that plaintiff was entitled only to payment of reasonable medical expenses which related to the fall on March 3, 1986, and the resulting thoracic outlet syndrome. However, the WCAC found that that condition did not continue to be disabling, and that the record did not support a finding of disabling carpal tunnel syndrome.

On appeal, plaintiff claims that the WCAC exceeded its reviewing authority in reversing the magistrate because there was material, competent and substantial evidence on the whole record to support the magistrate's conclusion that plaintiff proved a work-related thoracic outlet syndrome aggravated by his employment, a last day work injury date of September 28, 1988, a work-related carpal tunnel syndrome, and that he was unable to return to work due to the two syndromes. We agree.

Findings of fact made by a magistrate are conclusive on the WCAC if they are supported by competent, material and substantial evidence on the whole record. *Layman v Newkirk Electric Associates, Inc*, 458 Mich 494, 507; 581 NW2d 244, reh den 459 Mich 1204 (1998), citing *Goff v Bil-mar Foods, Inc (After Remand)*, 454 Mich 507, 513; 563 NW2d 214 (1997); MCL 418.861a(3); MSA 17.237(861a)(3). If competent, material and substantial evidence based on the whole record supports the magistrate's decision, the WCAC need go no further. *Layman, supra*, citing *Goff, supra*. If it does, the WCAC is exceeding the scope of its authority, and impermissibly substituting its judgment for the magistrate's. *Id.* In reviewing the magistrate's decision, the WCAC must do so with sensitivity and deference toward the findings and conclusions of the magistrate. Ultimately, the role of the Court of Appeals and the Supreme Court is only to evaluate whether the WCAC exceeded its authority. *Id.* Cf., *Connaway v Welded Construction Co*, ___ Mich App ___, ___ NW2d ___ (Docket No. 201559, issued 12/15/98, sl op 5-10).

A claimant is disabled if he is prevented by a work-related injury from performing even a single job within his qualifications and training under MCL 418.301(4); MSA 17.237(301)(4). *Haske v Transport Leasing, Inc*, 455 Mich 628, 634; 566 NW2d 896 (1997). To establish a compensable disability, the claimant must prove wage loss by establishing that due to a work-related injury, he has suffered a reduction in his wage-earning capacity. *Id.*

In this case, the magistrate's finding that plaintiff left defendant's employ due not only to dizziness but also to the effects of work-related thoracic outlet syndrome and carpal tunnel syndrome was supported by competent, material, and substantial evidence on the whole record. Plaintiff testified that, prior to his fall on March 3, 1986, he had no dizziness, pain, or numbness, whereas those symptoms began with his fall and existed at the time of trial some six years later. He also experienced shoulder and neck problems, difficulty breathing and reaching overhead, and tended to drop things. Dr. Martinez diagnosed and performed two surgeries on plaintiff for thoracic outlet syndrome, and also wanted plaintiff to have surgery for carpal tunnel syndrome, a recommendation which was seconded by Dr. Lawrence in a letter to Dr. Martinez which became part of the record. Plaintiff transferred to a job which would require less if any climbing and use of power tools. Nonetheless, plaintiff had continuing headaches and dizziness. The dizziness caused him on September 28, 1988, to drop some castings which harmed a coworker, and that was plaintiff's last day of work.

Drs. Basazarej and Asuncion testified that plaintiff's thoracic outlet syndrome and carpal tunnel syndrome were work-related and disabling, with Dr. Basazarej recommending surgery for carpal tunnel syndrome and Dr. Asuncion finding that the thoracic outlet syndrome was a permanent condition. Dr. Martinez testified that plaintiff's continuing inability to work was caused by scarring, weakening of muscles or carpal tunnel syndrome, the latter possibly being part of "four compression disease" which starts with the neck and goes down to the wrist. Dr. Brandt agreed that plaintiff's 1986 fall was a terrific trauma to the shoulder and rib cage and could have caused plaintiff's thoracic outlet syndrome. Even though Dr. Asuncion did not know the cause of plaintiff's dizziness, he did not dispute that plaintiff presented with that symptom and that it continues. In addition, plaintiff's testimony regarding continuing numbness was supported by Drs. Basazarej and Lawrence who recommended surgery for carpal tunnel syndrome, and by Dr. Asuncion who opined that the wrist numbness was consistent with plaintiff's history and condition. Plaintiff's injury was not attributable to a single event; therefore, the

finding of a last day worked injury date of September 28, 1988 was supported by the requisite evidence. MCL 418.301(1); MSA 17.237(301)(1). Because the magistrate's findings were supported by the requisite evidence, they were binding on the WCAC, and the WCAC therefore exceeded its authority in making its own findings. *Layman, supra*.

The decision of the WCAC is reversed, and the decision of the magistrate is affirmed.

/s/ Kathleen Jansen

/s/ Joseph B. Sullivan